

The record in this case consists of the documents on file with the Division of Workers Compensation including the transcript of the Preliminary Hearing held on August 8, 1994, before Administrative Law Judge George R. Robertson, and the exhibits attached thereto.

ISSUES

The claimant files her Application for Review requesting the Appeals Board to review this Preliminary Hearing Order raising the following issues:

- (1) Whether the claimant suffered a personal injury by accident that arose out of and in the course of her employment with the respondent; and,
- (2) Whether timely notice was given.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the entire record and for purposes of preliminary hearing, the Appeals Board finds as follows:

- (1) Jurisdiction is granted the Appeals Board to review a preliminary hearing order in regard to both of the foregoing issues, if disputed. See K.S.A. 44-534a(a)(2).

Claimant's request for medical treatment and payment of medical expenses was denied by the Administrative Law Judge in his Preliminary Hearing Order dated August 11, 1994. The Administrative Law Judge found that the claimant had not sustained her burden of proof as there was lack of objective medical findings to support a diagnosis of carpal tunnel syndrome, epicondylitis or tendinitis; additionally, claimant was secondarily motivated because of her termination and filing of a grievance; and, there was evidence of an intervening cause from her employment activities at Holiday Inn and her active weight-lifting activities. The Administrative Law Judge also found that notice of accident was not given within ten (10) days as required by K.S.A. 44-520 and that the claimant further failed to give a reason that would constitute "just cause" for not giving such required ten (10) day notice.

After a careful examination of the evidentiary record, the Appeals Board, for preliminary hearing purposes, finds that it is more probably true than not that the claimant has sustained an accidental injury to her right upper extremity and shoulder that arose out of and in the course of her employment with respondent. See K.S.A. 44-501(a) and K.S.A. 44-508(g).

The claimant was employed by the respondent from August 25, 1985, until she was terminated for reasons not related to her alleged work injury on April 2, 1994. Her job was to perform repetitive activities with her hands and arms in packaging bacon, one of the respondent's meat products. In August 1990, the claimant's right hand and arm became symptomatic. She notified the respondent and was sent for medical treatment to Dr. Unrein, who at that time was the company physician in Great Bend, Kansas. She was taken off work for one (1) week.

Since that time, the claimant has received daily treatment from the company nurse for pain and swelling in her right hand, arm and shoulder. The nurse would either wrap her hand, treat her hand with heat or cold, place her hand in wax or splint her right wrist so she would not be able to move her injured wrist. On the morning that the claimant was terminated, April 2, 1994, her right hand was wrapped by the company nurse because she could not squeeze her hand due to the pain and swelling.

After her termination, claimant went to work as a maid for Holiday Inn in Great Bend, Kansas, on April 5, 1994. This work caused her to have increased symptoms with her right hand and she quit this job after approximately a two (2) week period. She first sought medical treatment on April 15, 1994, with Dr. Merle J. Fieser, her family doctor, who took her off work. Dr. Fieser diagnosed carpal tunnel syndrome on the right and referred her to Central Kansas Medical Center for a nerve conduction study of the right upper extremity which was within normal limits.

A claim for compensation benefits was served on the respondent on April 20, 1994. Respondent at that time referred the claimant to C. Reiff Brown, M.D., an orthopedic surgeon in Great Bend, Kansas, for an examination and treatment. Dr. Brown's medical records are part of the evidentiary record in this matter and indicate that he first saw the claimant on May 23, 1994. Claimant gave a history to Dr. Brown of injuring her right hand due to her work activities while employed by the respondent. Dr. Brown's physical examination showed pain present mainly in the radial aspect of the wrist, distal forearm and swelling occurring in that area if there is continued use of the arm. Discomfort is present with any passive movement and becomes much more severe and radiates upward into the arm as well as down to the hand as use of the extremity is continued. Dr. Brown also reviewed x-rays and the electromyographic and nerve conductive study which was performed at Dr. Fieser's request. Dr. Brown concluded that the claimant has some element of tendinitis involving the extensors of the right thumb and wrist, biceps tendinitis on the right and extensor tendinitis of the right elbow. Dr. Brown found a positive Finkelstein test and physical findings consistent with biceps tendinitis. These conditions were mild in level of severity. Dr. Brown gave the claimant a prescription for Lodene and instructions to avoid specific activities that seemed to aggravate the symptoms.

Dr. Brown saw the claimant again on June 6, 1994, and she was much improved. The claimant was returned to light work activities with no repetitive use of the upper extremity. She was instructed to continue her exercises. The last time Dr. Brown saw the claimant was July 12, 1994, when the Finkelstein test was strongly positive with some roughness but no crepitus of the tendon was palpated on movement. Dr. Brown opined that this represents residual extensor tendinitis of the thumb or de Quervain's disease. Dr. Brown was informed that claimant had been working as a waitress and as a maid doing housekeeping duties since her termination by the respondent. It was Dr. Brown's opinion that these activities only temporarily aggravated her tendinitis. At that time, her symptoms had subsided to her baseline level of discomfort that was present at the time she worked for the respondent. He returned her to regular work after injecting the tendon sheath and prescribing a functional splinting device for her to wear. She was to return for further treatment in two to three (2-3) weeks. However, at that time the respondent notified the claimant that they would no longer provide medical treatment as her claim for compensation benefits was denied.

For preliminary hearing purposes, the claimant has established through her testimony that her right upper extremity and shoulder has been symptomatic since August 1990 due to her work activities with the respondent. She was able to perform her required job duties, while working for the respondent, with pain and the medical treatment provided every day by the company nurse. Dr. Brown, respondent's physician, diagnosed tendinitis in the claimant's upper extremity and de Quervain's disease, and opined that the claimant's subsequent employment only temporarily aggravated her condition that was present when she was terminated by the respondent. Since her termination, the claimant does not have the medical treatment available as previously provided by the respondent. Accordingly,

as the above persuasive evidence has established, the claimant is in need of medical treatment for her work-related injury.

(2) In regard to the issue of notice, the uncontradicted evidence establishes that the company nurse had personal knowledge of the claimant's continuing problems with her right upper extremity by the treatment she provided the claimant on a daily basis. K.S.A. 44-520 does not require the claimant to notify the respondent of an accident if a duly authorized agent of the respondent has actual knowledge thereof.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge George R. Robertson's Preliminary Hearing Order, dated August 11, 1994, is reversed and an Order is entered by the Appeals Board finding that the claimant did suffer a personal injury by accident arising out of and in the course of her employment with respondent. The Appeals Board further orders this case remanded to Administrative Law Judge George R. Robertson for appropriate orders based on the evidence contained in the preliminary hearing proceedings in regard to claimant's request for medical treatment and payment of medical bills.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Russell, Great Bend, KS
Orvel Mason, Arkansas City, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director